

JUL 25 1978

MICHAEL BODAK, JR., CLERK

No. **78-137**

In the
Supreme Court of the United States
..... Term, 1978

MOODY AUBREY TAYLOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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INDEX

	<u>Page</u>
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT	2
REASONS FOR GRANTING WRIT	4
CONCLUSION	9
CERTIFICATE OF SERVICE	10
APPENDIX A	A-1
APPENDIX B	B-1
APPENDIX C	C-1
APPENDIX D	D-1
APPENDIX E	E-1
APPENDIX F	F-1
APPENDIX G	G-1

LIST OF AUTHORITIES

Cases

	Page
Bell v. United States, 349 U.S. 81 (1955)	6
Bowers v. Kerbaugh-Empire Co., 271 U.S. 170 (1926)	5
Conner v. United States, 439 F.2d 974 (CA 5, 1971)	5
Doyle v. Mitchell, 247 U.S. 179 (1918)	4
Eisner v. Macomber, 252 U.S. (1919)	4, 7
Rinaldi v. United States, 434 U.S. 22 (1977)	2, 8, 9
Siravo v. United States, 377 F.2d 469 (CA 1, 1967)	5
United States v. Ballard, 535 F.2d 400 (CA 8, 1976)	5, 7
United States v. Bishop, 412 U.S. 346 (1973)	6
United States v. Enmons, 410 U.S. 396 (1973)	6
United States v. Levy, 533 F.2d 969 (CA 5, 1976)	8
United States v. Lewis, 475 F.2d 571 (CA 5, 1973)	6

Statutes

Internal Revenue Code of 1954 (26 U.S.C.):

Section 61	4
Section 101	7
Section 103	7
Section 6011	7, 8
Section 7203	5
Section 7206	2, 4-8

Miscellaneous

Treasury Regulations on Income Tax (26 C.F.R.):

Sec. 1.61-3	4
Sec. 1.61-4	5
Sec. 1.6012-1	5, 7, 8

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MOODY AUBREY TAYLOR,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Moody Aubrey Taylor, (hereinafter called Taxpayer),
petitions for a writ of certiorari to review the judgment of
the United States Court of Appeals for the Fifth Circuit in
this case.

OPINIONS BELOW

The decision of the District Court (App. A, *infra*)¹ is not
officially reported. The opinion of the Court of Appeals
(App. B, *infra*) is reported in 78-1 USTC Par. 9474.

¹ "App." refers to the appendix to this petition. "Doc." refers to
the District Court's index of documents and "Tr." to the transcript,
all of which are part of the record in the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 1978 (App. C, *infra*) and the Taxpayer's petition for rehearing was denied (App. D, *infra*) on June 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

STATUTES INVOLVED

The relevant provisions of the Internal Revenue Code of 1954, as amended, are set forth in App. E, *infra*, and the Treasury Regulations in App. F, *infra*.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming a conviction under Sec. 7206(1)² of the Internal Revenue Code for failure to report gross livestock sales receipts without proof that gross income resulted from such sales, as set forth in the "Instructions for Form 1040." App. G, *infra*.

2. Whether the Court of Appeals erred in affirming a conviction under Sec. 7206(1) of the Internal Revenue Code for failure to report gross livestock sales receipts on Schedule F, a form not required by the Internal Revenue Code or by the Treasury Regulations.

3. Whether, where the Internal Revenue Service prosecuting witness testified that official Internal Revenue Service policy was not to prosecute under Sec. 7206(1) unless there was a deficiency in taxes, under *Rinaldi v. United States*, 434 U.S. 22 (1977), the Court of Appeals erred in not requiring proof of a tax deficiency.

STATEMENT

The Taxpayer was indicted under the provisions of Sec. 7206(1) for the years 1970, 1971 and 1972. After a week-long

² All section references are to the Internal Revenue Code of 1954, as amended, unless otherwise identified.

trial, a guilty verdict was returned for each of the three years. The punishment assessed was confinement for two years each on tax years 1970 and 1971, and three years on tax year 1972.

At the conclusion of its case in chief, the Government had introduced evidence that the Taxpayer had gross livestock sales receipts (and not profits from such sales as stated in "Instructions for Form 1040") as follows (Gov. Ex. 117):

ITEM	1970	1971	1972
Livestock Receipts	\$141,548.77	\$267,966.60	\$154,091.50

All of Taxpayer's livestock sales were of cattle purchased for his own account and on many occasions on a joint venture basis with other cattle feeders. The cattle purchased were placed in a feedyard weighing around 600 pounds and fed until reaching a slaughtering weight of 1,000 to 1,100 pounds. Although some cattle were placed on pasture before going to the feedyard, Taxpayer did not have any other cattle ranching or cattle raising operations. All cattle sold were purchased as none were raised. (Tr. 970, 990, 991)

The Government offered no evidence on cost of cattle purchased, feed and feedyard charges, commissions paid on cattle purchased and sold, transportation costs or interest paid on cattle financed, all of such costs being necessary to determine profits.

Taxpayer reported no livestock sales for the years 1969, 1970 or 1971. For the year 1972, partnership income in the amount of \$8,002.48 was reported on Line 40, Form 1040, and Farm Income of \$8,745.34 was reported on Line 39, Form 1040. A Schedule F accompanied the Form 1040 showing livestock sales receipts in the amount of \$26,413.32 and commissions of \$5,847.50. (Gov. Ex. 3)

The Internal Revenue Service Special Agent testified (Tr. 834) that he also examined Taxpayer's 1969 return, and,

although Taxpayer had unreported livestock sales of \$82,656 (Def. Ex. 20), prosecution under Sec. 7206(1) was not recommended because Taxpayer sustained a loss on his livestock transactions. (Tr. 842) He further testified that it was official policy of the Internal Revenue Service not to prosecute under Sec. 7206(1) where the Taxpayer had no additional tax liability even though the omitted matters were material. (Tr. 843) The Government offered no evidence as to the amount of unreported profit for livestock sales (as required in "Instructions for Form 1040") or the amount of additional income tax alleged to be due for the years 1970, 1971 and 1972. Taxpayer offered evidence that he sustained a loss for all years involved, not just 1969 (Def. Ex. 46)

REASONS FOR GRANTING WRIT

I.

The basic issue here is whether a taxpayer can be convicted of a felony under Sec. 7206(1) for failure to include on a tax return an item not required to be reported by any provision of the Internal Revenue Code, any Treasury Regulations duly promulgated thereunder, and the "Instructions for Form 1040."

There is no provision in the Internal Revenue Code or in any Treasury Regulations requiring a Taxpayer to report livestock sales receipts. Sec. 61 requires a taxpayer to report gross income which includes "gains derived from dealings in property." It is well settled that gross sales receipts are not gross income where the item sold has been purchased or manufactured. *Doyle v. Mitchell*, 247 U.S. 179 (1918); *Eisner v. Macomber*, 252 U.S. 189 (1919). Gross income is that amount remaining after subtracting the appropriate cost of the goods sold from the gross sales receipts. Treas. Regs., Sec. 1.61-3.

Gross income for the farmer or rancher is "The profits from the sale of any livestock . . . purchased. * * * The profit from the sale of livestock . . . purchased is to be ascertained by deducting the cost from the sales price in the year in which the sale occurs, . ." Treas. Regs., Sec. 1.61-4(a) (2) and (5).

Even the "Instructions for Form 1040" published by the Internal Revenue Service for taxpayers state that for Schedule F "Include in income (a) profits received from the sale of livestock and other items purchased for resale . . ."

The concept of taxation under the Sixteenth Amendment was not the taxing of gross receipts, but of gross income, less allowable deductions. *Bowers v. Kerbaugh-Empire Co.*, 271 U.S. 170 (1926). The sales receipts of personal property purchased are not the equivalent of gross income, *United States v. Ballard*, 535 F.2d 400 (CA 8, 1976), because "there must be gain before there is income within the meaning of the Sixteenth Amendment", *Conner v. United States*, 439 F.2d 974 (CA 5, 1971).

Unless a taxpayer has gross income, no return is legally required. (See Treas. Regs., Sec. 1.6012-1) In a prosecution for failure to file a return under Sec. 7203, a misdemeanor, the Government must prove that the taxpayer had gross income, not just gross sales receipts. *Siravo v. United States*, 377 F.2d 469 (CA 1, 1967). Unless the Government presented evidence of Taxpayer's cost of cattle sold, there was no basis for determining whether the Schedule F form was even required to be filed. There is no evidence or logical reason to believe that Congress intended that the burden of proof be less in a felony prosecution under Sec. 7206(1) than it is under the misdemeanor provisions of Sec. 7203.

The Trial Court recognized this long standing principle of taxation when it instructed the jury (Tr. 1209):

Let me advise you right here it is also the burden on the government to prove by — beyond a reasonable doubt that the *receipts* as shown by the evidence were income under the laws and regulations in this case. (Emphasis added)

Without evidence of the cost of sales, the jury had no basis for determining the difference between gross receipts, which are not required to be reported, and gross income, which is required to be reported.

However, the Trial Court committed reversible error when it then charged the jury (Doc. 18, p. 187):

I also rule as a *matter of law* that if you find that a *substantial amount* of partnership income, *livestock receipts*, commissions, or other income was omitted from one or more of the federal income tax returns in issue here, such omission is of a material matter as contemplated by Section 7206, Subsection 1, of Title 26 of the United States Code. (Emphasis added)

The statute in question has been described as a "perjury statute." See *United States v. Bishop*, 412 U.S. 346 (1973); *United States v. Lewis*, 475 F.2d 571 (CA 5, 1973). This Court has stated that men of common intelligence cannot be required to guess at the meaning of a criminal provision, and, therefore, criminal statutes must be strictly construed, and any ambiguity must be resolved in favor of the accused. *United States v. Enmons*, 410 U.S. 396 (1973); *Bell v. United States*, 349 U.S. 81 (1955).

Sec. 7206(1) provides that the criminal act is the willful subscribing of a return which the signer knows is not true and correct as to every material matter. The term

"material matter" as used in this section, must, by necessity, relate to matters required to be reported by the Code or Regulations, and any matter not required to be reported by provisions of the Code or Regulations cannot come within the purview of this criminal provision.

For sure, a conviction could not stand for failing to report tax free life insurance proceeds under Sec. 101, or tax free municipal bond interest under Sec. 103, even though the amounts of these items might be material in relation to other income. Likewise, gross livestock sales receipts are not required by Code or Regulations to be reported. All that is required to be reported is gross income. Therefore, the gross income is the "material matter" under Sec. 7206(1) to be reported and not "gross sales receipts." *United States v. Ballard*, *supra*. The Court of Appeals holding to the contrary was error.

II.

Sec. 6011 provides that "... any person made liable for any tax imposed by this title, ... shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate." The Regulations pertaining to the forms to be filed by individuals are contained in Sec. 1.6012-1, and, in general, provide that any individual having *gross income* in excess of certain amounts is required to file a return using Form 1040. A taxpayer having gross livestock sales receipts for cattle purchased does not have gross income unless there is a profit. *Eisner v. Macomber*, *supra*.

The Taxpayer in this case filed Form 1040 for each of the three years. (Gov. Exs. 1, 2 and 3) Nowhere on this form is there a place to provide information regarding sales of any

type of personal property, and specifically, there is no place to report sales of livestock purchased. The forms for the year 1970 and 1971 contain on Line 38 "Farm income (or Loss) (Attach Schedule F)", and the form for 1972 contains the same listing on Line 39. Clearly, all that is required by Form 1040 return is the listing of the net farm income, and not gross cattle sales.

The form, Schedule F, is not prescribed as an official form under Treas. Regs. Sec. 1.6012-1. For individuals, only Form 1040 is listed as the required return. Sec. 6011 provides that taxpayers are required to file only forms prescribed by the Secretary or his delegate in duly promulgated regulations. It logically follows then that no conviction can be sustained under Sec. 7206(1) for failure to include any information on a form or schedule which has not been prescribed for filing by a duly authorized Treasury Regulation. See *United States v. Levy*, 533 F.2d 939 (CA 5, 1976). The Court of Appeals erred in holding that the Schedule F did not come within the ruling of the *Levy* case.

III.

In *Rinaldi v. United States*, *supra*, this Court held that a conviction, obtained contrary to Government policy, could not stand. The Court of Appeals erred in holding that said decision was not applicable to this case.

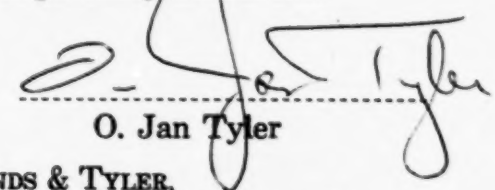
The Internal Revenue Service examined Taxpayer's returns for four years. Although substantial livestock sales receipts were omitted from the 1969 return, the Internal Revenue Service did not prosecute because, in accordance with its official policy, there is no prosecution under Sec. 7206(1) unless there is a tax deficiency. However, in prosecuting for the years 1970, 1971 and 1972, the Govern-

ment did not present any evidence of a tax deficiency. The inference left to the jury was there existed a tax deficiency, without proof. The Government, under the holding of the *Rinaldi* case, *supra*, should have been required to show there was a deficiency in taxes for the years 1970, 1971 and 1972 in order to sustain the conviction.

CONCLUSION

The decision of the Court of Appeals is erroneous and in conflict with decisions of this Court as well as in conflict with decisions of other Courts of Appeal and its own decisions. The petition for certiorari should be granted.

Respectfully submitted.



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CERTIFICATE OF SERVICE

It is hereby certified that service of this petition for writ of certiorari has been made on opposing counsel by mailing three copies thereof on this 24 day of July, 1978, in an envelope with postage prepaid, properly addressed as follows:

Solicitor General
Department of Justice
Washington, D. C. 20530

Myron C. Baum, Esq.
Assistant Attorney General
Department of Justice
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Judith A. Shepherd, Esq.
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Attorney
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O. Jan Tyler

1a

APPENDIX A

COPY

United States District Court for

United States of America vs.

DEFENDANT

NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

MOODY AUBREY TAYLOR

DOCKET NO. CR-2-77-8

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR
JUNE 27, 1977

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

O. JAN TYLER (hired)

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea.☐ NOLO CONTENDERE,☒ NOT GUILTY

FINDING & JUDGMENT

There being a jury verdict of☐ NOT GUILTY. Defendant is discharged☒ GUILTY to counts 1, 2, and 3 of the Indictment.

Defendant has been convicted and charged of the offense(s) of subscribing to false income tax returns, in violation of 26 USC 7206(1), as charged in counts 1, 2, and 3 of the Indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or equivalent to the same, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant be heavily committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS on count 1, TWO (2) YEARS on count 2, and THREE (3) YEARS on count 3. Said sentences on counts 1, 2, and 3 are to run concurrently.

IT IS FURTHER ORDERED that the defendant shall report to the United States Marshal's Office in Amarillo on Monday, July 11, 1977, at 10:00 a.m.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL

COMMITMENT RECOMMENDATION

SIGNED BY

☒ U.S. District Judge☐ U.S. Magistrate

HALBERT O. WOODWARD

June 27, 1977

It is ordered that a certified copy of this judgment and commitment be filed with the U.S. Marshal at the place of confinement of the defendant.

APPENDIX B

UNITED STATES v. TAYLOR

4444

UNITED STATES of America,
Plaintiff-Appellee,

v.

Moody Aubrey TAYLOR,
Defendant-Appellant.

No. 77-5443.

United States Court of Appeals,
Fifth Circuit.

May 30, 1978.

Defendant was convicted before the United States District Court for the Northern District of Texas, Halbert O. Woodward, Chief Judge, of wilfully making and subscribing false personal income tax returns, and he appealed. The Court of Appeals, Lynne, Senior District Judge of the Northern District of Alabama, sitting by designation, held that: (1) defendant's failure to report substantial amounts of gross livestock receipts on schedule F rendered his return materially false; (2) Government did not have burden of proving any taxes due; (3) contention that defendant did not believe the omission material because offsetting expenses rendered it without tax consequences did not go to materiality of the omitted receipts but, rather, to lack of mens rea in their omission, and (4) the same duty of honest reporting is required in connection with schedules as is required on the form 1040 proper.

Affirmed.

1. Internal Revenue ⇌ 2408

Inherent in the scheme of self-assessment of income taxes is the imperative that a return be truthful as to every material matter. 26 U.S.C.A. (I.R.C. 1954) §§ 1 et seq., 7206, 7206(1).

2. Internal Revenue ⇌ 2408

Unlike statute prohibiting willful attempt to evade or defeat a tax or statute proscribing willful failure to file a return, supply information or pay tax, statute proscribing, under penalty of perjury, a return which the maker does not believe to be true and correct as to every material matter requires the prosecution to prove neither intent to evade payment of taxes nor existence of any taxable income. 26 U.S.C.A. (I.R.C. 1954) §§ 7201, 7203, 7206(1).

3. Criminal Law ⇌ 1172.2

To extent that instruction that Government had burden of proving that subject receipts were income was erroneous, the error was harmless in prosecution for failing to report livestock receipts on income tax returns or to file supplemental schedules. 26 U.S.C.A. (I.R.C. 1954) § 7206(1).

4. Internal Revenue ⇌ 2408

Taxpayer's failure to report substantial amounts of gross livestock receipts, on schedule F, the schedule for reporting farm income and expenses, rendered the return materially false for purpose of prosecution for wilfully making and subscribing false income tax returns. 26 U.S.C.A. (I.R.C. 1954) § 7206(1).

5. Internal Revenue ⇌ 2458.1

Whether failure to support substantial amounts of gross livestock receipts on schedule F rendered recipient's federal tax return materially false, for purposes of fraud prosecution, was a matter of law. 26 U.S.C.A. (I.R.C. 1954) § 7206(1).

6. Perjury ⇌ 36

In a prosecution for perjury the materiality of the alleged false statement is a question of law.

7. Internal Revenue ⇨2408

In prosecution for wilfully making and subscribing false personal income tax returns specifically, failure to report livestock receipts, the test for materiality was whether the undisclosed information was essential in order to permit the Internal Revenue Service to verify and monitor the reporting of income. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

8. Internal Revenue ⇨2408

For purpose of fraud prosecution under internal revenue laws, omitted items may be material where reporting is necessary in order that the taxpayer estimate and compute his tax correctly. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

9. Internal Revenue ⇨2408

Omission of substantial amounts of livestock receipts from federal income tax returns constituted omission of a material matter for purposes of fraud prosecution; contention that taxpayer did not believe the omission to be material because offsetting expenses rendered it without tax consequences did not go to materiality of the omitted receipts but, rather, to lack of mens rea in their omission. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

10. Internal Revenue ⇨2408

Fact that schedules E and F, on which taxpayer failed to list certain livestock receipts, were not expressly promulgated by regulation did not preclude fraud prosecution based on failure to report substantial livestock receipts on such schedules since such schedules when appropriate, become integral parts of required form 1040 and are incorporated therein by reference; understatement of receipts on the 1040 return rendered such return untrue and incorrect and omission of schedules reporting such re-

ceipts rendered those returns false. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

11. Internal Revenue ⇨2408

Same duty of honest reporting is required in connection with tax schedules as is required for entries on the tax form proper. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

12. Internal Revenue ⇨2447

In prosecution for wilfully making and subscribing false personal income tax returns by failing to report substantial livestock receipts the Government did not have the burden of proving taxes due. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

13. Internal Revenue ⇨2448

Although Internal Revenue Service agent testified that IRS policy was not to recommend prosecution unless it could prove a tax deficiency, conviction of wilfully making and subscribing false personal income tax returns was not required to be reversed on ground that the Government implied that it did not prosecute defendant for one year because he owed no additional taxes and, hence, jury was led to believe that the Government thought that defendant evaded taxes for years for which he was prosecuted since official IRS policy deems a nominal tax deficiency one of several factors to be considered in recommending prosecution and there was no contention that any Justice Department policy was violated. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

Appeal from the United States District Court for the Northern District of Texas.

Before CLARK and GEE, Circuit Judges, and LYNNE, District Judge.*

* Senior District Judge of the Northern District of Alabama, sitting by designation.

LYNNE, District Judge:

Appellant, Moody Aubrey Taylor, was convicted on three counts of wilfully making and subscribing false personal income tax returns in violation of 26 U.S.C. § 7206(1).¹ The district court sentenced him to imprisonment for concurrent terms of two years each on Counts 1 and 2, relating to the tax years 1969 and 1970, and three years on Count 3, relating to the tax year 1972.

Taylor challenges his conviction on several grounds, relying primarily upon his assertion that proof of unreported gross receipts is not sufficient to support a conviction for violating Section 7206(1). We affirm.

Defendant Taylor was employed by Producers Grain Corporation (P.G.C.), a regional grain cooperative headquartered in Amarillo, Texas. In 1969, P.G.C. entered the custom cattle feeding business, feeding cattle P.G.C. feed for a fee plus the cost of feed. Defendant managed P.G.C.'s feeding operation from its inception and became vice president in charge of its livestock division.

P.G.C. encouraged its employees to purchase cattle to be fed in P.G.C.'s feed lots. In the three tax years in question herein defendant bought and sold cattle for his own account and in partnerships and joint ventures with others, feeding them at P.G.C.'s feed lots.

Defendant did not report any livestock receipts on his 1970 or 1971 income tax

returns and did not file Schedules E or F² with either return. On his 1972 return, defendant filed both schedules and reported some, but not all, of his livestock receipts for the year.

The government alleged that on each return defendant wilfully failed to report substantial amounts of livestock receipts, partnership income, commissions and other income. Government Exhibit 117, introduced in the government's case in chief, summarized the unreported transactions as follows:

ITEM	1970	1971	1972
Livestock Receipts	\$141,548.77	\$267,966.60	\$154,091.50
Partnership Income	509.97	692.12	13,853.02
Commissions and Other Income	7,125.99	99,459.07	89,817.07

In addition, during cross-examination of defendant the government introduced evidence of other unreported receipts.

In essence, Taylor's defense to the allegations was that his unreported income was offset by unreported losses. He testified that he did not know that he was required to report losses. Defendant kept no systematic written records of his cattle transactions, relying upon periodic mental calculations to determine that his losses exceeded profits.

[1, 2] We do not consider it oversimplification to assert that inherent in the scheme of self-assessment of income taxes is the imperative that a return by a taxpayer must be truthful as to every material matter. Section 7206(1) is a fraud statute. Unlike sections 7201 or

shall be fined not more than \$5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

All statutory references herein refer to sections of the Internal Revenue Code, 26 U.S.C. §§ 1, et seq. (1977).

2. Schedule E is a supplemental income schedule of which income or losses from partnerships is computed. Schedule F is the schedule for reporting farm income and expenses.

1. 26 U.S.C. § 7206 (1977) provides that:

Any person who—

(1) *Declaration under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * *

7203,³ section 7206(1) requires the prosecution to prove neither intent to evade payment of taxes nor the existence of any taxable income. As it relates to the case sub judice, the section requires simply that the government prove that defendant willfully made and subscribed a return, that it contained a written declaration that it was made under penalties of perjury, and that defendant did not believe the return to be true and correct as to every material matter.

It is undisputed that defendant made and subscribed a return that contained a written declaration that it was made under penalties of perjury. The only questions at issue were whether the return was not true and correct as to every material matter and whether defendant possessed the requisite *mens rea*.⁴

[3] The trial court charged the jury thus on the issue of materiality:

I also rule as a matter of law that if you find that a substantial amount of partnership income, livestock receipts, commissions, or other income was omitted from one or more of the federal income tax returns in issue here, such omission is of a material matter as contemplated by Section 7206, Subsection 1, of Title 26 of the United States Code.⁵

3. Section 7201 prohibits the willful attempt to evade or defeat tax. Section 7203 proscribes the willful failure to file a return, supply information, or pay tax.

4. The trial court allowed defendant to introduce evidence of offsetting expenses to support his contention that he believed that he sustained a loss on his unreported income and that he believed that he was not required to report losses.

Defendant does not challenge on appeal the trial court's careful charge to the jury on the *mens rea* required for conviction.

5. Apparently in conflict with this instruction was a later instruction of the court. After instructing the jury in the definition of gross

Counsel for defendant objected to the charge that the omission of livestock receipts is material as a matter of law.

[4] This appeal raises squarely the question of whether a taxpayer's failure to report substantial amounts of gross livestock receipts on Schedule F renders the return materially false. We hold that it does.

[5,6] The trial judge did not err in deciding the question of materiality as a matter of law rather than submitting it to the jury. We have long held that in a prosecution for perjury the materiality of the alleged false statement is a question of law. *Blackmon v. United States*, 108 F.2d 572, 574 (5th Cir. 1940). The rule applies to prosecutions under section 7206(1). *Hoover v. United States*, 358 F.2d 87 (5th Cir. 1966), *cert. denied* 385 U.S. 822, 87 S.Ct. 50, 17 L.Ed.2d 59 (1966); *accord*, *United States v. Romanow*, 509 F.2d 26 (1st Cir. 1975).

[7,8] The test for materiality in this case is whether the information is essential in order to permit the Internal Revenue Service to verify and monitor the reporting of income. *United States v. DiVarco*, 484 F.2d 670 (7th Cir. 1973).⁶

income under Treas.Reg. § 1.61-4(a), the court stated, "Let me advise you right here it is also the burden on the government to prove by—beyond a reasonable doubt that the receipts as shown by the evidence were income under the laws and regulations in this case." To the extent that such instruction is erroneous under our holding in this case, the error is harmless to defendant.

6. Omitted items may also be material where reporting is necessary "in order that the taxpayer estimate and compute his tax correctly." *United States v. Warden*, 545 F.2d 32 (7th Cir. 1976). Application of *DiVarco* to this case renders consideration of the *Warden* test unnecessary.

In *DiVarco* the court held that the misstatement of the source of the taxpayer's income was material. The court rejected the argument that section 7206(1) required a showing of any understatement of income. The false statement in *DiVarco* had no direct relationship to the amount of the taxpayer's liability.

In *United States v. Romanow*, 509 F.2d 26 (1st Cir. 1975),⁷ the court accepted the *DiVarco* premise that materiality might be based upon the likelihood that the false statement would be calculated to impede the IRS in its investigation and auditing of the return. The court stated that the measure of the materiality of a false statement is its potential impact. *Id.* at 27.

In the instant case the information required by Schedule F was vitally necessary for the IRS to verify defendant's claim that he realized a net loss from his livestock transactions. Without such information the IRS was compelled to conduct an extensive investigation of bank deposit records in an attempt to reconstruct defendant's income. Here the taxpayer conducted dozens of transactions involving over one hundred thousand dollars in receipts in each tax year and kept no written records. In such a case the burden imposed upon the IRS to verify the taxpayer's return is so extreme that it verges upon impossibility.

7. In *Romanow* the defendant was convicted of making a false statement on four Employers Quarterly Federal Tax Returns. Defendant falsely reported the amount of employees' wages deposited in the federal reserve bank. The Court held that the falsehood was material despite defendant's argument that the IRS made no use of the information. Defendant contended that the IRS computer receives data directly from the depository banks and is not programmed to consider the taxpayer's entry regarding deposits for the quarter.

8. Siravo filed a return for tax years 1958-1960. He filed no return for 1961. Siravo was convicted under Section 7206(1) for making false

Other courts of appeals have considered directly whether omission of gross receipts is a material falsehood. In *Siravo v. United States*, 377 F.2d 469 (1st Cir. 1967), the court affirmed a conviction under section 7206(1), holding that gross receipts from the taxpayer's business were "material items necessary to the computation of income." *Id.* at 472. In striking similarity to Taylor, Siravo received wages, which he reported,⁸ and also operated a jewelry assembling business. He made no entry on his Form 1040 opposite the heading "profit (or loss) from business," nor did he file a separate Schedule C. The government proved that he had received gross receipts ranging from \$22,242 to \$54,319 for the three years in question. The government offered no proof that taxpayer's receipts exceeded his expenses or that he realized any gross income from his business.

Although in *Siravo* one prosecution witness insinuated that the taxpayer's gross receipts and gross income might be the same, clearly the appellate court disagreed. 377 F.2d at 474. The court definitely treated the offense as the failure to report gross receipts from business, regardless of the existence of gross income.⁹

returns for three tax years. He was convicted under Section 7203 for failing to file a return for the fourth year. We are, of course, concerned primarily with the convictions under Section 7206(1).

9. The definition of gross income derived from business is not identical to the definition of gross income derived from farming; compare Treas.Reg. § 1.61-3 with Treas.Reg. § 1.61-4. This distinction makes no difference to the outcome of this case, the important point being that in both cases the defendant was convicted for failure to report gross receipts, without regard to whether gross income was received.

Siravo is factually similar to Counts 1 and 2 involved herein. In the tax years 1970 and 1971, Taylor failed to report gross livestock receipts and failed to attach Schedule F to his return.

United States v. Morse, 491 F.2d 149 (1st Cir. 1974) followed *Siravo*. The taxpayers allegedly understated their gross receipts. The court held that such misrepresentations were material under section 7206(1). Relying on *Siravo*, the court stated that the amount of gross receipts is an integral and necessary figure in the computation of taxable income and the amount of tax due. 491 F.2d at 157, n. 16.

Similarly, in Count 3 Taylor was convicted of understating the amount of his receipts and income on Schedule F of his 1972 return. *Siravo* and *Morse* suggest that Taylor's willful failure to report correctly his gross receipts renders his returns materially false for each year.

Defendant's position finds no support in *United States v. Ballard*, 535 F.2d 400 (8th Cir. 1976). There the court held that the government's burden under an indictment charging failure to report "substantial income" could not be carried by proof of failure to report "substantial receipts." *Siravo* was distinguished because its indictment, as was true for the indictment in the case at bar, charged willful failure to disclose gross receipts.

We are persuaded by the analyses of *Siravo* and *Morse* and hold that the omission of substantial gross receipts prevents the return from being true and correct as to every material matter. Requiring the government to prove the omission of gross income comes near to requiring the proof of additional tax liability. Such a definition of "material"

would seriously jeopardize the effectiveness of section 7206(1) as a perjury statute and would imperil the self-assessment nature of our tax system.

[9] In sum, we hold that the jury was correctly instructed that the omission of substantial amounts of livestock receipts from Taylor's income tax returns in 1970, 1971 and 1972 would, as a matter of law, constitute the omission of a material matter. Taylor was permitted to present as a defense that he did not believe the omission was material because offsetting expenses rendered it without tax consequences. The existence of such offsets, however, did not go to materiality of the omitted receipts, but to the lack of *mens rea* in their omission.

[10, 11] We reject defendant's contention that because the schedules were not expressly promulgated by any regulation, section 7206(1) does not require truthful reporting on Schedules E and F. Defendant's reliance upon *United States v. Levy*, 533 F.2d 969 (5th Cir. 1976), is misplaced. There we reversed the conviction of a defendant who subscribed a false Internal Revenue Service Form 433-AB, a form used in connection with settlement negotiations.

Section 7206(1) pertains to willful subscription to "any return, statement, or other document" made under penalty of perjury. *Levy* involved the question of whether Form 433-AB was a "statement" within the meaning of the statute. We held that "statement" referred only to documents required by the Internal Revenue Code or any lawfully promulgated regulation. Since no statute or regulation authorized the use of Form 433-AB, the IRS could not lawfully require its execution under penalties of perjury.

The instant case does not involve interpretation of "statement." For each tax year in question defendant filed a Form 1040, which clearly is a "return." See Treas.Reg. § 1.6012-1.

While there is no explicit requirement in the regulations for the completion and filing of Schedules E and F, it is implicit in required Form 1040 that such schedules, when appropriate, become integral parts of such form and are incorporated therein by reference. Cf. *United States v. Siravo*, *supra*. Each Form 1040 filed by this defendant included lines reading "Pensions and annuities, rents and royalties, partnerships, estates or trusts, etc. (attach Schedule E)," ¹⁰ and "Farm income (or loss) (attach Schedule F)." ¹¹ Therefore, we conclude that section 7206(1) requires the same duty of honest reporting on schedules as it requires for entries on the Form proper.

Thus, defendant's understatement of his receipts on his 1972 return rendered the return untrue and incorrect. Likewise, defendant's omission of schedules reporting his receipts for 1970 and 1971 rendered those returns false. ¹²

Defendant contends that the trial judge erred in another respect. The court charged the jury that the government did not have the burden of proving any tax liability. Defendant objected to the charge, arguing that the government had implied that it did not prosecute defendant for the year 1969 because he owed no additional taxes; therefore, the jury was led to believe that the government thought that defendant had evaded taxes for the years for which he was prosecuted.

An IRS Special Agent, W. C. McMenemy, testified that IRS policy was not to recommend prosecution unless it could prove a tax deficiency. The government contends that any implication of tax liability was created by defendant's attorney, who, on cross-examination, initiated the questions to McMenemy about IRS policy.

[12] *United States v. Johnson*, 558 F.2d 744 (5th Cir. 1977), forecloses extended discussion of this issue. There we held that government implications of underpayment of taxes did not alter the rule that tax liability is immaterial to a prosecution under section 7206(1). We affirmed that conviction, rejecting defendant's contention that he was entitled to introduce evidence that he had in fact overpaid his taxes. *A fortiori*, in this case, the government did not have the burden of proving taxes due, and the court properly instructed the jury.

Defendant further contends that *Rinaldi v. United States*, 434 U.S. 22, 98 S.Ct. 81, 54 L.Ed.2d 207 (1977) proscribes this prosecution. He argues that Agent McMenemy's testimony was that IRS policy is to recommend prosecution to the Justice Department only where the IRS can prove a tax deficiency, and that the government did not attempt to do so in this case.

In *Rinaldi* the Supreme Court held that the trial judge erred in overruling the government's motion to dismiss the case, made after defendant's conviction. The basis for the motion was that the Justice Department had prosecuted defendant in violation of its policy not to prosecute for a federal offense following a state conviction of the same act.

10. Line 37 on the 1970 and 1971 Form 1040 return. Line 39 on the 1972 return.

11. Line 38 on the 1970 and 1971 return. Line 40 on the 1972 return.

12. We make no legal distinction between the willful omission of material facts and the willful misstatement of material facts. *United States v. Cohen*, 544 F.2d 781 (5th Cir. 1977).

UNITED STATES v. TAYLOR

[13] The facts of the instant case fall far short of *Rinaldi*. Despite Agent McMenamy's testimony, official IRS policy deems a nominal tax deficiency one of several factors to be considered in recommending prosecution. *Internal Revenue Manual* 1218, pt. 9-2 (1973). Moreover, defendant does not contend that any Justice Department policy was violated by this prosecution. Cf. *Petite v. United States*, 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960). Finally, unlike *Rinaldi*, in this case the government vigorously opposes dismissal. See *Fry v. United States*, 569 F.2d 303 (5th Cir. 1978). For these reasons, *Rinaldi* does not preclude affirmance of this conviction.

The balance of defendant's arguments are directed at the sufficiency of the evi-

dence against him. Viewing the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Barrera*, 547 F.2d 1250 (5th Cir. 1977), we conclude that the evidence amply supports the jury's verdict.

We need not reach defendant's contentions relating to the government's proof of unreported partnership income, commissions, and other income. The proof of substantial amounts of unreported livestock receipts is sufficient to sustain the verdict on each count. The evidence entitled the jury to infer that defendant's actions were "willful" and to reject defendant's "good faith" defense.

AFFIRMED.

APPENDIX C

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 77-5443

D. C. Docket No. CR-2-77-8

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MOODY AUBREY TAYLOR,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas

Before CLARK and GEE, Circuit Judges, and LYNNE, District Judge.*

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

May 30, 1978

Issued As Mandate:

*Senior District Judge of the Northern District of Alabama, sitting by designation.

Id
APPENDIX D

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

June 26, 1978

TEL 504-589-6514
800 CAMP STREET
NEW ORLEANS, LA. 70130

TO ALL PARTIES LISTED BELOW:

NO. 77-5443 - U.S.A. vs. Moody Aubrey Taylor

Dear Counsel:

This is to advise that an order has this day been entered denying the petition() for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition() for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Clara F. Sachs
Deputy Clerk

cc Mr. O. Jan Tyler
Messrs. Allan B. Hankins
Robert D. Forrester
Ms. Judith A. Shepherd
Mr. Jimmy L. Tallant

APPENDIX E

§ 61. Gross income defined

(a) **General definition.**—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

- (1) Compensation for services, including fees, commissions, and similar items;
- (2) Gross income derived from business;
- (3) Gains derived from dealings in property;
- (4) Interest;
- (5) Rents;
- (6) Royalties;
- (7) Dividends;
- (8) Alimony and separate maintenance payments;
- (9) Annuities;
- (10) Income from life insurance and endowment contracts;
- (11) Pensions;
- (12) Income from discharge of indebtedness;
- (13) Distributive share of partnership gross income;
- (14) Income in respect of a decedent; and
- (15) Income from an interest in an estate or trust.

§ 101. Certain death benefits

(a) **Proceeds of life insurance contracts payable by reason of death.**—

- (1) **General rule.**—Except as otherwise provided in paragraph (2) and in subsection (d), gross income does not include amounts received (whether in a single sum or otherwise) under a life insurance contract, if such amounts are paid by reason of the death of the insured.

§ 103. Interest on certain governmental obligations

(a) **General rule.**—Gross income does not include interest on—

- (1) the obligations of a State, a Territory, or a possession of the United States, or any political subdivision of any of the foregoing, or of the District of Columbia; and
- (2) qualified scholarship funding bonds.

§ 6011. General requirement of return, statement, or list

(a) **General rule.**—When required by regulations prescribed by the Secretary any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

(b) **Identification of taxpayer.**—The Secretary is authorized to require such information with respect to persons subject to the taxes imposed by chapter 21 or chapter 24 as is necessary or helpful in securing proper identification of such persons.

§ 7203. Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

§ 7206. Fraud and false statements

Any person who—

(1) **Declaration under penalties of perjury.**—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) **Aid or assistance.**—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

APPENDIX F

TREASURY REGULATIONS ON INCOME TAX (26 C.F.R.):

§ 1.61-3 Gross income derived from business

(a) **In general.** In a manufacturing, merchandising, or mining business, "gross income" means the total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources. Gross income is determined without subtraction of depletion allowances based on a percentage of income to the extent that it exceeds cost depletion which may be required to be included in the amount of inventoriable costs as provided in § 1.471-11 and without subtraction of selling expenses, losses or other items not ordinarily used in computing costs of goods sold or amounts which are of a type for which a deduction would be disallowed under section 162(c), (f), or (g) in the case of a business expense. The cost of goods sold should be determined in accordance with the method of accounting consistently used by the taxpayer.

(b) **State contracts.** The profit from a contract with a State or political subdivision thereof must be included in gross income. If warrants are issued by a city, town, or other political subdivision of a State, and are accepted by the contractor in payment for public work done, the fair market value of such warrants should be returned as income. If, upon conversion of the warrants into cash, the contractor does not receive and cannot recover the full value of the warrants so returned, he may deduct any loss sustained from his gross income for the year in which the warrants are so converted. If, however, he realizes more than the value of the warrants so returned, he must include the excess in his gross income for the year in which realized. Added T.D. 6500, Nov. 26, 1960, 25 F. R. 11402, 14021, and amended T.D. 7207, Oct. 4, 1972, 37 F.R. 20767; T.D. 7285, Sept. 19, 1973, 38 F.R. 26184.

§ 1.61-4 Gross income of farmers

(a) **Farmers using the cash method of accounting.** A farmer using the cash receipts and disbursements method of accounting shall include in his gross income for the taxable year—

(1) The amount of cash and the value of merchandise or other property received during the taxable year from the sale of livestock and produce which he raised,

(2) The profits from the sale of any livestock or other items which were purchased,

(3) All amounts received from breeding fees, fees from rent of teams, machinery, or land, and other incidental farm income,

(4) All subsidy and conservation payments received which must be considered as income, and

(5) Gross income from all other sources.

The profit from the sale of livestock or other items which were purchased is to be ascertained by deducting the cost from the sales price in the year in which the sale occurs, except that in the case of the sale of purchased ani-

mals held for draft, breeding, or dairy purposes, the profits shall be the amount of any excess of the sales price over the amount representing the difference between the cost and the depreciation allowed or allowable (determined in accordance with the rules applicable under section 1016(a) and the regulations thereunder). However, see section 162 and the regulations thereunder with respect to the computation of taxable income on other than the crop method where the cost of seeds and young plants purchased for further development and cultivation prior to sale is involved. Crop shares (whether or not considered rent under State law) shall be included in gross income as of the year in which the crop shares are reduced to money or the equivalent of money.

(b) **Farmers using an accrual method of accounting.** A farmer using an accrual method of accounting must use inventories to determine his gross income. His gross income on an accrual method is determined by adding the total of the items described in subparagraphs (1) through (5) of this para-

graph and subtracting therefrom the total of the items described in subparagraphs (6) and (7) of this paragraph. These items are as follows:

(1) The sales price of all livestock and other products held for sale and sold during the year;

(2) The inventory value of livestock and products on hand and not sold at the end of the year;

(3) All miscellaneous items of income, such as breeding fees, fees from the rent of teams, machinery, or land, or other incidental farm income;

(4) Any subsidy or conservation payments which must be considered as income;

(5) Gross income from all other sources;

(6) The inventory value of the livestock and products on hand and not sold at the beginning of the year; and

(7) The cost of any livestock or products purchased during the year (except livestock held for draft, dairy, or breeding purposes, unless included in inventory).

All livestock raised or purchased for sale shall be added in the inventory at their proper valuation determined in accordance with the method authorized and adopted for the purpose. Livestock acquired for draft, breeding, or dairy purposes and not for sale may be included in the inventory (see subparagraphs (2), (6), and (7) of this paragraph) instead of being treated as capital assets subject to depreciation, provided such practice is followed consistently from year to year by the taxpayer. When any livestock included in an inventory are sold, their cost must not be taken as an additional deduction in computing taxable income, because such deduction is reflected in the inventory. See the regulations under section 471. Crop shares (whether or not considered rent under State law) shall be included in gross income as of the year in which the crop shares are reduced to money or the equivalent of money.

(c) **Special rules for certain receipts.** In the case of the sale of machinery, farm equipment, or any other property (except stock in trade of the taxpayer, or property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business), any excess of the proceeds of the sale over the adjusted basis of such property shall be included

in the taxpayer's gross income for the taxable year in which such sale is made. See, however, section 453 and the regulations thereunder for special rules relating to certain installment sales. If farm produce is exchanged for merchandise, groceries, or the like, the market value of the article received in exchange is to be included in gross income. Proceeds of insurance, such as hail or fire insurance on growing crops, should be included in gross income to the extent of the amount received in cash or its equivalent for the crop injured or destroyed. See section 451(d) for special rule relating to election to include crop insurance proceeds in income for taxable year following taxable year of destruction. For taxable years beginning after (insert date that these regulations are filed in final form by the Federal Register), where a farmer is engaged in producing crops and the process of gathering and disposing of such crops is not completed within the taxable year in which such crops are planted, the income therefrom may, with the consent of the Commissioner (see section 446 and the regulations thereunder), be computed upon the crop method. For taxable years beginning on or before (insert date that these regulations are filed in final form by the Federal Register), where a farmer is engaged in producing crops which take more than a year from the time of planting to the time of gathering and disposing, the income therefrom may, with the consent of the Commissioner (see section 446 and the regulations thereunder), be computed upon the crop method. In any case in which the crop method is used, the entire cost of producing the crop must be taken as a deduction for the year in which the gross income from the crop is realized, and not earlier.

(d) **Definition of "farm".** As used in this section, the term "farm" embraces the farm in the ordinarily accepted sense, and includes stock, dairy, poultry, fruit, and truck farms; also plantations, ranches, and all land used for farming operations. All individuals, partnerships, or corporations that cultivate, operate, or manage farms for gain or profit, either as owners or tenants, are designated as farmers. For more detailed rules with respect to the determination of whether or not an individual is engaged in farming, see § 1.175-3. For rules applicable to persons cultivating or operating a farm for recreation or pleasure, see sections 162 and 165, and the regulations thereunder.

(e) **Cross references.** (1) For election to include Commodity Credit Corporation loans as income, see section 77 and regulations thereunder.

(2) For definition of gross income derived from farming for purposes of limiting deductibility of soil and water conservation expenditures, see section 175 and regulations thereunder.

(3) For definition of gross income from farming in connection with declarations of estimated income tax, see section 6073 and regulations thereunder.

Added T.D. 6500, Nov. 26, 1960, 25 F.R. 11402, 14021, and amended T.D. 7198, July 13, 1972, 37 F.R. 13679.

1.6011 [Comprehensive Code section 6011, see 26 U.S.C.A. (I.R.C. 1954) § 6011]

1.6011-1 General requirement of return, statement, or list

(a) **General rule.** Every person subject to any tax, or required to collect any tax, under subtitle A of the Code, shall make such returns or statements as are required by the regulations in this chapter. The return or statement shall include therein the information required by the applicable regulations or forms.

(b) **Use of prescribed forms.** Copies of the prescribed return forms will so far as possible be furnished taxpayers by district directors. A taxpayer will not be excused from making a return, however, by the fact that no return form has been furnished to him. Taxpayers not supplied with the proper

forms should make application therefor to the district director in ample time to have their returns prepared, verified, and filed on or before the due date with the internal revenue office where such returns are required to be filed. Each taxpayer should carefully prepare his return and set forth fully and clearly the information required to be included therein. Returns which have not been so prepared will not be accepted as meeting the requirements of the Code. In the absence of a prescribed form, a statement made by a taxpayer disclosing his gross income and the deductions therefrom may be accepted as a tentative return, and, if filed within the prescribed time, the statement so made will relieve the taxpayer from liability for the addition to tax imposed for the delinquent filing of the return, provided that without unnecessary delay such a tentative return is supplemented by a return made on the proper form.

1.6012 [Comprehensive Code section 6012, see 26 U.S.C.A. (I.R.C. 1954) § 6012]

1.6012-1 Individuals required to make returns of income

(a) **Individual citizen or resident—**

(1) **In general.** Except as provided in subparagraph (2) of this paragraph, an income tax return must be filed by every individual for each taxable year beginning before January 1, 1973, during which he receives \$600 or more of gross income, and for each taxable year beginning after December 31, 1972, during which he receives \$750 or more of gross income, if such individual is—

- (i) A citizen of the United States, whether residing at home or abroad,
- (ii) A resident of the United States even though not a citizen thereof, or
- (iii) An alien bona fide resident of Puerto Rico during the entire taxable year.

(2) **Special rules.** (i) For taxable years beginning before January 1, 1970, an individual who is described in subparagraph (1) of this paragraph and who has attained the age of 65 before the close of his taxable year must file an income tax return only if he receives \$1,200 or more of gross income during his taxable year.

(ii) For taxable years beginning after December 31, 1969, and before January 1, 1973, an individual described in subparagraph (1) of this paragraph (other than an individual referred to in section 142(b))—

(a) Who is not married (as determined by applying section 143(a) and the regulations thereunder) must file an income tax return only if he receives \$1,700 or more of gross income during

his taxable year, except that if such an individual has attained the age of 65 before the close of his taxable year an income tax return must be filed by such individual only if he receives \$2,300 or more of gross income during his taxable year.

(b) Who is entitled to make a joint return under section 6013 and the regulations thereunder must file an income tax return only if his gross income received during his taxable year, when combined with the gross income of his spouse received during his taxable year, is \$2,300 or more. However, if such individual or his spouse has attained the age of 65 before the close of the taxable year an income tax return must be filed by such individual only if their combined gross income is \$2,900 or more. If both the individual and his spouse have attained the age of 65 before the close of the taxable year such return must be filed only if their combined gross income is \$3,500 or more. However, this subdivision (ii) (b) shall not apply if the individual and his spouse did not have the same household as their home at the close of their taxable year, if such spouse files a separate return for a taxable year which includes any part of such individual's taxable year, or if any other taxpayer is entitled to an exemption for such individual or his spouse under section 151(e) for such other taxpayer's taxable year beginning in the calendar year in which such individual's taxable year begins. For example, a married student more than half of whose support is furnished by his father must file an income tax return if he receives \$600 or more of gross income during his taxable year.

(iii) For taxable years beginning after December 31, 1972, an individual described in subparagraph (1) of this paragraph (other than an individual referred to in section 142(b))—

(a) Who is not married (as determined by applying section 143(a) and the regulations thereunder) must file an income tax return only if he receives \$1,750 or more of gross income during his taxable year, except that if such an individual has attained the age of 65 before the close of his taxable year an income tax return must be filed by such individual only if he receives \$2,500 or more of gross income during his taxable year.

(b) Who is entitled to make a joint return under section 6013 and the regulations thereunder must file an income tax return only if his gross income received during his taxable year, when combined with the gross income of his spouse received during his taxable year, is \$2,500 or more. However, if such individual or his spouse has attained the age of 65 before the close of the taxable year an income tax return must be filed by such individual only if their combined gross income is \$3,250 or more. If both the individual and his spouse attain the age of 65 before the close of the taxable year such return must be

filed only if their combined gross income is \$4,000 or more. However, this subdivision (iii) (b) shall not apply if the individual and his spouse did not have the same household as their home at the close of their taxable year, if such spouse files a separate return for a taxable year which includes any part of such individual's taxable year, or if any other taxpayer is entitled to an exemption for the taxpayer or his spouse under section 151(e) for such other taxpayer's taxable year beginning in the calendar year in which such individual's taxable year begins. For example, a married student more than half of whose support is furnished by his father must file an income tax return if he receives \$750 or more of gross income during the taxable year.

(iv) For purposes of section 6012(a) (1) (A) (ii) and subdivisions (ii) (b) and (iii) (b) of this subparagraph, an individual and his spouse are considered to have the same household as their home at the close of a taxable year if the same household constituted the principal place of abode of both the individual and his spouse at the close of such taxable year (or on the date of death, if the individual or his spouse died within the taxable year). The individual and his spouse will be considered to have the same household as their home at the close of the taxable year notwithstanding a temporary absence from the household due to special circumstances, as, for example, in the case of a nonpermanent failure on the part of the individual and his spouse to have a common abode by reason of illness, education, business, vacation, or military service. For example, A, a calendar-year individual under 65 years of age, is married to B, also under 65 years of age, and is a member of the Armed Forces of the United States. During 1970 A is transferred to an overseas base. A and B

give up their home, which they had jointly occupied until that time; B moves to the home of her parents for the duration of A's absence. They fully intend to set up a new joint household upon A's return. Neither A nor B must file a return for 1970 if their combined gross income for the year is less than \$2,300 and if no other taxpayer is entitled to a dependency exemption for A or B under section 151(e).

(v) In the case of a short taxable year referred to in section 443(a) (1),

an individual described in subparagraph (1) of this paragraph shall file an income tax return if his gross income received during such short taxable year equals or exceeds his own personal exemption allowed by section 151(b) (prorated as provided in section 443(c)) and, when applicable, his additional exemption for age 65 or more allowed by section 151(c) (1) (prorated as provided in section 443(c)).

* * * * *

(6) Form of return.—Form 1040 is prescribed for general use in making the return required under this paragraph. Form 1040A is an optional short form which, in accordance with paragraph (a)(7) of this section, may be used by certain taxpayers. A taxpayer otherwise entitled to use Form 1040A as his return for any taxable year may not make his return on such form if he elects not to take the standard deduction provided in section 141, and in such case he must make his return on Form 1040. For taxable years beginning before January 1, 1970, a taxpayer entitled under section 6014 and § 1.6014-1 to elect not to show his tax on his return must, if he desires to exercise such election, make his return on Form 1040A. Form 1040W is an optional short form which, in accordance with paragraph (a)(8) of this section, may be used only with respect to taxable years beginning after December 31, 1958, and ending before December 31, 1961.

1972

Instructions

for

Form 1040

and for Schedules

A, B, C, D, E, F

Instructions for Schedule F (Form 1040)

A. Cash Receipts and Disbursements Method of Reporting

Include in income (a) Profits received from the sale of livestock and other items purchased for resale, (b) Cash and the value of merchandise or other property received from the sale of livestock and produce raised during 1972 or prior years, (c) Other farm income.

Your expenses are the amounts you paid during 1972, plus deductions such as depreciation.

An election may be made to report crop insurance proceeds in income in the taxable year following the taxable year of destruction or damage if you can establish that it is your practice to report income from such crops in a following taxable

year. For further information, contact any Internal Revenue Service office, or get Publication 225, Farmer's Tax Guide.

B. Accrual Method of Reporting

The gross profits are figured as indicated in summary of income and deductions on page 2 of Schedule F. Farm expenses are the actual expenses incurred during 1972, whether you paid them or not. You can value inventories according to the "farm-price method," which provides for the valuation of inventories at market price less direct cost of disposition, or you can use other methods. Farmers raising livestock can value their inventories of animals according to either the "farm-price method" or the "unit-livestock-price method."

C. Income

Generally, you should report all farm income in Schedule F. However, if you received rental income based upon farm production or if you received crop shares based on the renting of all or part of your crop land on a crop share basis, and you did not materially participate in the operation of the farm, report such income on Form 4835, Farm Rental Income and Expense (such income is not subject to self-employment tax) and Schedule E. If you materially participated in the operation of a farm, the rental income you received is subject to self-employment tax and should be reported in Schedule F. Under both the cash and the accrual methods of reporting, report crop shares received only for the year in which they are converted to money or its equivalent, such as merchandise or property.

Sales, exchanges, or involuntary conversions of certain trade or business property are to be reported on Form 4797, Supplemental Schedule of Gains and Losses.

Anything of value received instead of cash, such as groceries in exchange for produce, must be treated as income to the extent of its market value. The value of farm produce consumed by the farmer and his family need not be reported as income, but expenses incurred in raising such produce must not be claimed as deductions. Recoveries from insurance on growing crops should be included. ("Cash method" taxpayers, see item A.)

Cooperative Allocations, Dividends and Advances

Also include in farm income: (1) per-unit retain allocations received from cooperatives in money and qualified per-unit retain certificates (to the extent of stated dollar amounts), and (2) patronage dividends received from cooperatives in money and qualified written notices of allocation (to the extent of stated dollar amount).

Patronage dividends received in property other than written notices of allocation are includible in farm income to the extent of fair market value.

Cash advances received from marketing cooperatives you do business with are includible in farm income.

See Publication 225 for detailed instructions on how and when to report the receipt and redemption of nonqualified certificates and nonqualified written notices, and the receipt of patronage dividends received on purchase of assets and nonbusiness purchases.

Federal Gasoline Tax Credit

If you use the "cash method," enter in Part I, line 24 any Federal gasoline tax claimed as a credit on Form 1040 for 1971. If you use the "accrual method," enter in Part V, line 65 any Federal gasoline tax you claim as a credit on Form 1040 for 1972.

Agricultural Program Payments

In Cash.—Enter the total amount of price support payments, diversion payments, and cost share payments received in cash (sight drafts).

In Materials and Services.—If you received benefits in the form of materials, such as fertilizer or lime, or in the form of services, such as grading or the construction of dams, enter the total amount paid by the Department of Agriculture to the vendor or contractor.

Commodity Credit Corporation Loans

If commodities are pledged as security for a loan from the Commodity Credit Corporation, income is not considered received until the commodities are delivered or forfeited to the Corporation, unless an election is made to include the loan in income when received. If you made this election or delivered or forfeited the pledged commodity, enter the amount received on this line. In the case of an election, attach to your return a statement showing details of the loan. You must continue to report similar loans as income until you receive permission from the Commissioner to change your method of accounting.

D. Expenses and Other Deductions

Note: That portion of wage, salary, rent and price payments in excess of amount permitted under Executive Order 11640,

issued pursuant to the authority of the Economic Stabilization Act of 1970, as amended, is not deductible as a business expense under section 162(c)(2). (Revenue Ruling 72-236.)

Labor Hired.—You can deduct amounts paid for farm labor. Do not deduct the value of your own labor or that of your family. Deduct only that part of the board which is purchased for hired labor. The value of products furnished by the farm and used in the board of hired labor is not deductible. Do not deduct amounts paid to persons who did household work except to the extent their services are used in boarding and otherwise caring for farm laborers.

Repairs and Maintenance.—You can deduct amounts paid for repairs and maintenance of farm buildings (except your dwelling), farm machinery and equipment; and the cost of ordinary tools of short life or small cost, such as shovels, rakes, etc. Include in this deduction the total amount of repairs from Form 4832.

Rent of Farm, Part of Farm, or Pasture.—You can deduct rent paid in cash. A tenant farmer paying rent to his landlord in the form of crops raised on the farm under a crop share agreement cannot deduct as rent the value of the crop, but he can deduct amounts paid in raising the crop.

Fertilizers, Lime, etc.—These can be either capitalized or deducted as an expense.

Taxes.—You can deduct State and local taxes. Do not deduct Federal income taxes; estate, inheritance, legacy, succession, and gift taxes; nor taxes assessed for any improvement or betterment. Do not deduct taxes on your dwelling or household property and other taxes not related to the business of farming.

Conservation Expenses.—You can deduct certain amounts spent (including any amount paid on any assessment levied by a soil or water conservation or drainage district to recover the amount the district spent) for soil or water conservation and the prevention of erosion on land you use.

The allowable deduction for any one year cannot exceed 25 percent of your gross income from farming (excluding certain gains from sales of assets such as farm machinery or from the disposition of land). But any excess can be carried over to the following years with the same limit applying to those years. See Publication 225.

Land Clearing.—You can deduct amounts spent for clearing land to make it suitable for farming. This deduction cannot be more than 25 percent of taxable income from farming, or \$5,000, whichever is less.

Retirement Plans, etc.

Line 48.—Enter the amount being claimed as a deduction for contributions to a pension, profit sharing, or annuity plan.

Note: Every employer who has adopted a pension, profit-sharing, or other funded deferred compensation plan, regardless of whether or not the plan is qualified under the Internal Revenue Code or whether a deduction is claimed for the current taxable year, must file Form 4848 for all plans adopted. In general, Form 4848 is to be filed on or before the 15th day of the 5th month following the close of the taxable year. If the plan includes you as a self-employed person, enter contributions made as an employer on your behalf (but not voluntary contributions you made as an employee) on Form 1040, line 49, instead of on line 48 of Schedule F. (See Form 4848.)

Line 49.—Enter the amount of your contributions to employee benefit programs that are not an incidental part of a pension or profit-sharing plan included on line 48. Contributions to employee benefit programs that are to be reported on this line include insurance, health, and welfare programs.

Automobile Expenses, Special Rule.—See page 9 of instructions for Form 1040. (Line 48) optional method.

Other Farm Expenses.—Include such items as advertising, stationery, stamps, account books, other office supplies, etc.

Losses of property included in your inventory are taken care of by the reduced amount of the inventory at the end of the year. The loss of a prospective crop by frost, storm, flood, or fire is not deductible. When using the cash method, the value of animals you raised that were lost by death is not deductible. For animals you bought that were lost by death, the cost less depreciation allowed or allowable is deductible if not compensated by insurance or otherwise. Do not deduct personal losses.

Planting and Developing Citrus and Almond Groves.—Charge to capital account expenses for the planting, cultivation, maintenance, or development of any citrus and almond grove (or part of such grove), incurred before the close of the fourth tax year beginning with the tax year in which trees were planted. (See Publication 225.)

Depreciation.—You can deduct an allowance for the depreciation of buildings, improvements, machinery, or other farm equipment of a permanent nature. Similar assets may be grouped together as one item for reporting purposes in the depreciation schedule in Schedule F. In figuring depreciation, do not include the value of land. Do not claim depreciation on livestock or any other property included in your inventory. You can claim depreciation on livestock not included in your inventory if you acquired them for work, breeding, or dairy purposes.

Class Life (ADR) System and Guideline Class Life System.—If depreciation is figured by using the Class Life (ADR) System for assets placed in service after December 31, 1970, or the Guideline Class Life System for assets placed in service before January 1, 1971, you must file Form 4832 (Class Life (ADR) System) or Form 5006 (Guideline Class Life System). Except as

otherwise expressly provided in income tax regulations sections 1.167(a)-11(b)(5)(vi) and 1.167(a)-12, the provisions of Revenue Procedures 62-21 and 65-13 are not applicable for taxable years ending after December 31, 1970. For more information, get Instructions for Form 4832, Form 5006, and Publication 534, Tax Information on Depreciation.

See instructions on back of Form 4562 for more detailed information regarding methods of computing depreciation, other than the new depreciation rules mentioned in the preceding paragraph.

Income from farming is subject to the self-employment tax. (See Schedule SE.) If you filed Form 4029, do not file Schedule SE. Instead, write "Exempt—Form 4029" on line 62, Form 1040.

Additional Information Available.—You can get Publication 225, Farmer's Tax Guide, free from your county agricultural agent or an Internal Revenue Service office.

What Income To Report

Examples of Income You Must Report.—

Wages including employer supplemental unemployment benefits, salaries, bonuses, commissions, fees, and tips.

Dividends.

Earned income from sources outside U.S. (See Form 2555 and note below.)

Earnings (interest) from savings and loan associations, mutual savings banks, credit unions, etc.

Interest on tax refunds.

Interest on bank deposits, bonds, notes.

Interest on U.S. Savings Bonds.

Interest on arbitrage bonds issued after Oct. 9, 1969, by State and local governments.

Profits from businesses and professions.
Your share of profits from partnerships and small business corporations.

Pensions, annuities, endowments, including lump-sum distributions.

Supplemental annuities under the Railroad Retirement Act (but not regular Railroad Retirement Act benefits).

Profits from the sale or exchange of real estate, securities, or other property.

Sale of personal residence. (See Instructions for Schedule D.)

Recapture of depreciation on disposition of depreciable residential real estate and other property. (See Instructions for Form 4797.)

Recapture of intangible drilling and development costs of oil and gas properties. (See Instructions for Form 4797.)

Rents and royalties.

Your share of estate or trust income, including accumulation distribution from trusts.

Alimony, separate maintenance or support payments received from and deductible by your spouse or a former spouse.

Prizes and awards (contests, raffles, etc.).

Refunds of State and local taxes (principal amounts) if they were deducted in a prior year and resulted in tax benefits.

Fees received for jury duty and precinct election board duty.

Fees received as an Executor, Administrator, or Director.

Embezzled or other illegal income.

Note: If you were a bona fide resident of a foreign country for an uninterrupted period of one year or more, or were physically present in a foreign country for a total of at least 510 days during any period of 18 consecutive months, you can exclude up to \$15,000 of your earned income from foreign sources by filing Form 2555. However, if you elect not to exclude such earned income, attach a statement to your timely filed return stating that you elect not to have the exclusion apply. Once made the election cannot be changed except with consent of the Commissioner.

Examples of Income You Do Not Report.—

Disability retirement payments and other benefits paid by the Veterans Administration.

Dividends on veterans' insurance.

Life insurance sums received at a person's death.

Workmen's compensation, insurance, damages, etc., for injury or sickness.

Interest on certain State and municipal bonds.

Federal social security benefits.

Gifts, money or other property you inherited or that was willed to you.

Insurance repayments that were more than the cost of your normal living expenses if you lost the use of your home because of fire or other casualty. Repayments of the amount you spent for normal living expenses must be reported as income.

SEP 15 1978

MICHAEL RODAK, JR., CLERK

No. 78-137

In the Supreme Court of the United States

OCTOBER TERM, 1978

MOODY AUBREY TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.,
*Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

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**MEMORANDUM FOR THE UNITED STATES
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Petitioner argues that his failure to report substantial amounts of gross receipts from the sale of livestock on his federal income tax returns did not constitute the offense of filing false tax returns in violation of 26 U.S.C. 7206(1).

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on three counts of filing false income tax returns for 1969, 1970 and 1972, in violation of 26 U.S.C. 7206(1). The trial court sentenced him to prison terms of two years on Counts 1 and 2, and three years on Count 3, to run concurrently. The court of appeals affirmed (Pet. App. B).

The evidence adduced at trial showed that petitioner was engaged in the cattle feeding business but had neither reported any gross receipts from the sale of livestock on his 1970 and 1971 income tax returns nor reported his income or expenses from his cattle enterprise on the prescribed Schedule F for those years. On his 1972 return, petitioner reported some, but not all, of his gross receipts from the sale of livestock and did file a Schedule F for that year. Moreover, petitioner failed to report partnership income and commissions for all three years (Pet. App. B, p. 3b).

In defense, petitioner testified that his unreported gross receipts from the sale of livestock were offset by unreported losses. He also testified that he did not know that he was required to report losses. Petitioner kept no systematic records of his cattle transactions; he relied instead upon mental calculations to determine that his losses exceeded profits (*ibid.*).

Petitioner argues (Pet. 4-5) that the Internal Revenue Code does not require him to report gross receipts from the sale of livestock, only gross income,¹ and that the government bears the burden of showing that petitioner actually had gross income from his livestock business.² But conviction of the offense of filing false returns under Section 7206(1) does not require proof of intent to evade

¹Treasury Regulations on Income Tax (1954 Code), §1.61-4(a) (26 C.F.R.) provides that gross income of farmers includes the profits from the sale of any livestock. The profit from the sale of livestock is computed by deducting the cost from the sales price.

²Petitioner asserts (Pet. 6) that the district court recognized this principle in its instructions to the jury, which provided as follows (Pet. App. B, p. 4b n. 5):

Let me advise you right here it is also the burden on the government to prove by—beyond a reasonable doubt that the receipts

payment of taxes or the existence of any taxable income. Rather, Section 7206(1) is a fraud statute that requires the government to show that the defendant willfully made and subscribed a return, that it contained a written declaration that it was made under penalties of perjury, and that the defendant did not believe it to be true and correct as to every material matter. The only question in this case was whether petitioner was required to report gross receipts from the sale of livestock in order to file a true and correct return within the meaning of the statute. As the court of appeals properly observed (Pet. App. B, p. 5b), a tax return that omits material items necessary to the computation of income is not true and correct within the meaning of Section 7206(1). *United States v. DiVarco*, 484 F. 2d 670, 673 (C.A. 7); *Siravo v. United States*, 377 F. 2d 469, 472 (C.A. 1).

Here, the amount of gross receipts from petitioner's sale of livestock was information necessary to determine his gross income. The evidence of unexplained gross receipts from the sale of livestock adduced by the government established a *prima facie* case of petitioner's filing a false return by failing to report gross income. This evidence shifted to petitioner the burden of coming forward with evidence as to the amount of offsetting expenses, if any. *United States v. Ballard*, 535 F. 2d 400, 405 (C.A. 8), certiorari denied, 429 U.S. 918; *Siravo v. United States*, *supra*, 377 F. 2d at 473-474; *United States v. Shavin*, 320

as shown by the evidence were income under the laws and regulations in this case.

To the extent that this instruction was erroneous, under its decision, the court of appeals held that it was harmless to petitioner (Pet. App. B, p. 4b n. 5).

F. 2d 308, 312 (C.A. 7), certiorari denied, 375 U.S. 944. Since petitioner did not come forward with any cogent evidence of expenses, he was properly convicted of filing a false return.

Petitioner also contends (Pet. 7-8) that Form 1040 does not require the reporting of gross receipts from the sale of livestock, and that Schedule F, which requires such reporting, is not a form prescribed by the Secretary or his delegate in duly promulgated regulations as is required by Section 6011. But it is implicit in Form 1040, which was required to be filed in this case, that Schedule F, when appropriate, becomes an integral part of Form 1040 and is incorporated therein by reference. Each Form 1040 filed by petitioner included lines reading "Farm income (or loss) (attach Schedule F)."³ As the court of appeals correctly noted (Pet. App. B, p. 7b), Section 7206(1) requires the same duty of honest reporting on Schedule F as is required for entries on Form 1040.

Finally, petitioner argues (Pet. 8) that in a prosecution under Section 7206(1), the government must show that there is a deficiency for the tax years in which a conviction was obtained. However, the courts have uniformly held that in a prosecution for filing a false income tax return, the government need not prove a tax deficiency. The crime is complete with the willful filing of a return which contains false information as to a material matter. *United States v. Johnson*, 558 F. 2d 744, 746 (C.A. 5), certiorari denied, No. 77-746, February 21, 1978; *United States v. Ballard*, *supra*, 535 F. 2d at 404; *United States v. DiVarco*, *supra*, 484 F. 2d at 673; *United States v. Null*, 415 F. 2d 1178 (C.A. 4).⁴

³Line 38 on the 1970 and 1971 return. Line 40 on the 1972 return.

⁴*Rinaldi v. United States*, 434 U.S. 22, upon which petitioner relies (Pet. 8-9), does not support his assertion that his prosecution violated

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1978.

a purported Internal Revenue Service policy against prosecution under Section 7206(1) unless there is a tax deficiency. As the court of appeals noted (Pet. App. B, p. 8b), there is no such policy of the Internal Revenue Service or the Department of Justice. The existence of a tax deficiency is only one of several factors to be considered when recommending prosecution and is not a prerequisite to such a recommendation. Moreover, *Rinaldi* dealt with the Department of Justice's policy concerning dual federal-state prosecutions and has no application here.